

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 03/16/17; Decision Issued: 03/17/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10955; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10955

Hearing Date: March 16, 2017

Decision Issued: March 17, 2017

PROCEDURAL HISTORY

On December 7, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for sexual misconduct.

On January 5, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 31, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The College of William and Mary employed Grievant as a Director of its Campus Post Office. He had been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action was introduced.

In the afternoon on Friday September 9, 2016, the Temporary Worker was alone in a room in the Building. She was holding items to be placed in mail boxes on the wall. Grievant entered the room and approached her from her right side. She turned towards Grievant to see who entered the room. Grievant approached the Temporary Worker. He placed his left hand on the back of her head to turn her face towards him. He placed his right hand on the back of her buttock. He "cupped" her rear end as he pulled the Temporary Worker close and placed his lips on the Temporary Worker's lips to kiss her. The Temporary Worker was not expecting Grievant's action and she pulled backwards. Another employee entered the room just as Grievant finished kissing the Temporary Worker.¹ Grievant and the Temporary Worker observed the other employee. Grievant walked out of the room.

The Temporary Worker was upset and walked to the restroom. She remained there for several minutes crying. She left the restroom and returned to her duties and tried to avoid Grievant. Grievant approached her again when she was alone. He mentioned that she was scheduled to work the following morning at approximately 8 a.m. and that they would have private time and he would buy her breakfast. He told her

¹ The other employee did not see the incident.

not to tell anyone what happened earlier since the “females in the office had it out for him” and he did not want to get fired.

After Grievant left the office for the day, the Temporary Worker approached the Supervisor and told him what Grievant had done. The Supervisor discussed the incident and his reporting requirements with the Temporary Worker. Because he learned of the incident late in the afternoon, the Supervisor reported the incident to Agency managers on the following business day. The Agency began an investigation that resulted in Grievant’s removal.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

DHRM Policy 2.30 governs Workplace Harassment. This policy provides:

Workplace Harassment: Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation. ***

Sexual Harassment: Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).

- Quid pro quo – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.
- Hostile environment – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work. ***

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

On September 9, 2016, Grievant approached the Temporary Worker, grabbed her head to turn her face towards him, grabbed her buttock, and kissed the Temporary Worker on her lips. The Temporary Worker did not expect and did not consent to Grievant's behavior. Grievant's sexual advance was unwelcome and on the basis of her sex. It denigrated the Temporary Worker. Grievant interfered with the Temporary Worker's work because she stopped sorting the mail and was unable to perform her duties for several minutes as she cried in the restroom. She attempted to alter her work hours on the following day to avoid working with Grievant. Grievant created a hostile work environment for the Temporary Worker through his unwelcome severe touching of the Temporary Worker. Grievant caused the workplace to be offensive for the Temporary Worker under both a subjective and objective reasonable personal standard.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for engaging in workplace harassment.³ Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he did not kiss or grab the buttock of the Temporary Worker. He asserted the Temporary Worker lacked credibility as evidenced by the "fork incident" where the Temporary Worker gave three different dates during which Grievant allegedly placed a fork near his genital area and invited the Temporary Worker to retrieve the fork after she asked for a fork to eat her meal. Grievant objected to the Temporary Worker's testimony by telephone instead of in person. He pointed out that he did not flirt with or display excessive attention to the Temporary Worker. He claimed he had no motive to touch the Temporary Worker and she was motivated to file a false charge because he had moved her to another position which made her angry at him.

The Temporary Worker's testimony was sufficient to support the Agency's allegations against Grievant. Her testimony was credible. The Hearing Officer is capable of determining the credibility of a witness who testifies by telephone. The Temporary Worker testified credibly that she was not angry because Grievant moved her to another position. The Temporary Worker's confusion regarding the date of the "fork incident" was not sufficient to discredit her credible testimony regarding the events of September 9, 2016. The Temporary Worker had no motive to lie about Grievant's actions.

Grievant was informed of his opportunity to testify and call other witnesses on his behalf. He had several witnesses testify on his behalf but did not testify himself. The Hearing Officer could not determine the credibility of Grievant's denial because he did

³ Grievant also violated Agency policies similar to DHRM Policy 2.30.

not testify. Given that the Temporary Worker's testimony was credible and the absence of a credible denial by Grievant, the Hearing Officer can only conclude that the Agency has met its burden of proof.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁴ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

⁴ *Va. Code § 2.2-3005.*

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.